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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners, by their attorney, pray that a writ of certiorari issue to review the judgment entered in this case on March 1, 1955, by the United States Court of Appeals for the Tenth Circuit, reversing the judgment in favor of petitioners rendered January 30, 1954, by the United States District Court for the District of Utah.

Opinions Below

The opinion of the court of appeals is reported at 220 F. 2d 666. (Clerk, Ct. of App., Tr. 3-14.) The oral opinion of the district court appears at R. 400-405. The findings of fact and conclusions of law of the district court appear at R. 19-49.

Jurisdiction

The judgment of the court of appeals was entered on March 1, 1955. A petition for rehearing was denied on

April 15, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether agents of the Department of the Interior, purporting to act under the Utah "abandoned horse" statute, may confiscate and destroy livestock belonging to Navajo Indian wards of the United States, as a pre-determined method of driving the Indians from their ancestral homes on the federal range, without liability to the Indians under the Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*

Statutes Involved

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.*; the Federal Range Code, 43 CFR 161.1 *et seq.*; and 5 Utah Code Annotated, 1953, Title 47, Chapter 2,[1] are printed in the Appendix, pp. 19-24.

Statement

Petitioners are Navajo Indians and wards of the federal government. They instituted this suit under the Tort Claims Act to recover compensation for the unlawful slaughter of their livestock by agents of the United States.[2] In this way, the Navajos seek redress for the damages they suffered when federal officers, under the subterfuge of enforcing a state statute carried out their real objective of forcing petitioners to flee from their ancestral homes, by capturing and brutally destroying the Indians' horses, the most important element in their native economy.

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[1] This also appears as Title 64, Chapter 2, Utah Code Annotated, 1943, which was in force during the period in controversy.

[2] There is no question here as to the authority of the Government agents to take the action complained of by petitioners. This was admitted by the United States Attorney during the trial before the district court. (R. 78).

To fully appreciate the vicious character of the acts committed by respondent's agents, we must examine the environment in which they occurred. From time immemorial, petitioners and their families have lived in permanently constructed "hogans" upon an area of what is now public land in the southeastern corner of Utah. The Navajo Indians are herdsmen, and for many generations continuously grazed horses and other livestock upon the land. (Fdgs. 1, 8, 17, R. 19, 25, 29.) In view of the limited resources of their country, the horse has become a vital part of the Indians' culture and economy, serving as beast of burden and as means of transportation, and, indeed, is a part of their religious life. (Fdgs. 9-14, R. 25-28.)

Following passage of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315 *et seq.*, the area used by petitioners was incorporated within the boundaries of Utah Grazing District No. 6. (Fdg. 3, R. 20-21.) Permits to graze in the area were issued to white livestock operators. (Fdg. 4, R. 21.) Until 1946, the Navajos were not disturbed in their use of these lands for grazing purposes in common with non-Indians. After the employment of a new federal Range Manager in that year, however, the respondent's agents commenced a deliberate, and increasingly intensive campaign of harassment and molestation to frighten the Navajos into surrendering possession of the area. Federal officers threatened the destruction of livestock and the imprisonment of individual Indians. They went so far as to seize and chain the wives of four of the petitioners—one with an infant in arms. On another occasion, they threatened to take small children from a Navajo widow, to put her in jail, and to destroy her livestock unless she left the country. She immediately left the country. (Fdgs. 17-20, R. 29-32.)

In 1950, resorting to more regular legal recourse, the United States brought suit in the federal district court to

enjoin Navajos, including some of the petitioners, from grazing their livestock in the area.[3] Contemporaneously, local stockmen instituted similar proceedings in the Utah state court.[4] Apparently, however, the operation of orderly judicial process did not satisfy the respondent's agents. Without awaiting the ultimate disposition of either of these proceedings, the Range Manager for the Department of the Interior, at his own instance, initiated administrative steps looking towards the destruction of the Indians' horses and only the Indians' horses.

The federal regulations concerning livestock trespasses on public lands require that any "alleged violator * * * be served with a written notice * * *." 43 CFR 161:11 (a). (Fdg. 5, R. 22.) No such notice was served in this case. (R. 401), although the Government agents knew to whom the horses belonged and could identify their brands, all of which were plain and some of which were recorded under state law. (Fdgs. 24, 28, 30, R. 35, 38, 40.) Instead, the Range Manager purported to invoke a Utah statute, commonly referred to as the "abandoned horse" statute, which had been enacted in 1927 (Fdg. 6, R. 22). Utah Code Annotated, Title 64, c. 2, secs. 1-7 (1943).

The state statute, in providing a method for eliminating "abandoned horses"[5] from the range, called for pub-

[3] *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D., Utah; October 31, 1950). The district court's judgment of dismissal was reversed and the complaint reinstated for further proceedings. *United States* v. *Hosteen Tse-Kesi*, 191 F.2d 518 (C.A. 10; August 30, 1951). Several months after the Indians had been driven from the range by the Government's agent, as set out in this case, the United States represented that the case was moot and the district court dismissed. (Fdg. 18, R. 30.)

[4] *Young* v. *Felornia*, — Utah —, 244 P.2d 863 (May 21, 1952) certiorari denied 344 U.S. 886 (November 17, 1952).

[5] An "abandoned horse" is defined in the Utah statute as any such animal "unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding * * * and running at large upon the open range of this state * * *. An animal not bearing a decipherable

lished and posted notices, authorized by the Board of County Commissioners, to the effect that the elimination of such livestock would begin on a certain day. About July 9, 1952, the federal Range Manager approached one of the three Commissioners on the street and advised him of a plan to invoke the "abandoned horse" law. The individual Commissioner interposed no objection. (Fdg. 21, R. 32.) On the next day, July 10, the first published notice of a program to eliminate abandoned horses appeared. Subsequently, when publication had been completed, the Range Manager, realizing that there had been no official authority from the Board of County Commissioners, called on a second Commissioner, suggesting that some authorization for his acts be made a matter of record. At a Board meeting held September 2, 1952, there was set out in the minutes for the first time a resolution dated July 9, 1952, prior to the date of first publication of notice under the "abandoned horse" statute, purportedly approving that program. (Fdg. 21, R. 32-33.)[6]

Beginning on September 20, 1952, and continuing until this action was instituted on March 20, 1953, the respondent's agents captured and completely destroyed the Indians' horses. (Fdg. 19, R. 31.) The animals were rounded up on the range and were either driven or hauled in trucks to corrals up to 45 miles away. Horses which

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brand recorded in the office of the recorder of marks and brands shall be deemed unbranded." Utah Code Annotated, Title 64, c. 2, sec. 1, 1943.

[6] There was a conflict of oral testimony on the question of whether the County Board had ever acted on the request to invoke the "abandoned horse" statute prior to September 2, 1952. The district judge, after observing the witnesses, and hearing them testify, and noting the inconsistencies in their testimony, was of the view that respondent's witnesses were not telling the truth concerning adoption of the resolution (R. 402-403). The district court found the resolution was not properly adopted prior to the meeting of September 2, 1952. (Fdg. 21, R. 34, 44.) The court of appeals, however, disregarded this finding and took the view that a proper resolution had been in force prior to the advertising of the notice (220 F.2d 668-669).

could not be so handled were shot and killed by the Government's agents on the spot. The remainder were accorded brutal treatment: the horses were so jammed together in the trucks that some died as a result; and in one instance a horse's leg inconveniently protruding through the truck body was sawed off by a federal employee. (Fdg. 25, R. 36.) Later, the animals were taken in trucks to Provo, Utah, a distance of 350 miles, where they were sold to a glue factory and horse meat plant for about $1,700, no part of which was received by petitioners. (Fdg. 24, R. 35-36.)

The respondent's agents were engaged in the wholesale slaughter of Indian livestock, without regard to existing property rights, as part of a preconceived plan to drive these Indians from their homes by destroying their means of livelihood. After all, the Government's concern was not with 150 horses and burros on an area where permits had been issued for the grazing of 3,899 cattle and 33,818 sheep (R. 398). It was the Indians themselves that these federal agents sought to remove through destruction of the horses. For this reason, the respondent's agents did not intend to permit the redemption of Navajo horses and granted no opportunity for redemption. (Fdg. 24, R. 35-36.) On one occasion, where one of the petitioners located his horses and asked to be permitted to reclaim them, payment of $60 per head was demanded by the Range Aid, a sum the federal employee knew the Indian could not pay. (Fdg. 26, R. 36-37.) In another instance, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to the Government corral, where Sakezzie requested the federal Range Aid to return his horses. (Fdg. 27, R. 37.) During the conversation, one of the white stockmen left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them

the understanding that respondent's agents were prepared to shoot the Indians if they attempted to retake their horses. (Fdg. 27, R. 37.) Sakezzie and his family became so frightened and intimidated by the threatening display of firearms that they departed peaceably and returned to their hogan without obtaining the horses. (Fdg. 27, R. 37-38.) By contrast, five horses belonging to white men and unavoidably gathered with petitioners' horses were delivered by federal officers directly to the pastures or corrals of their owners, with a handling charge of only $2.50 per head. (Fdg. 26, R. 36.)

The district court concluded that the provisions of the Utah "abandoned horse" statute on which the Government relied were not applicable, because the United States, by the enactment of the Taylor Grazing Act, had undertaken complete control of its own lands; that the requirements of the Taylor Grazing Act and the regulations issued thereunder, particularly 43 CFR 161.11, concerning written notice, had not been followed by the agents of the Department of the Interior; that, even if the Utah statute were applicable, its provisions concerning authorization from the County Board had not been satisfied; and that, in any event, petitioners' horses were not "abandoned horses" within the meaning of the Utah statute. (R. 43-47, 400-405).

In so holding, the district court recognized the unique position of the horse in the Navajo culture and economy, and the unique value of these animals to the petitioners. (Fdgs. 8-16, 29, R. 25-29, 38-40.) The court further recognized the dreadful consequences, in terms of financial loss and personal injury, visited upon these Indians by the acts of federal officers in wantonly destroying the basic means by which they gained their livelihood and, indeed, maintained their very existence. (Fdgs. 31, 1-3, R. 40-43.) The Navajos' horse is part of his way of life, specially trained and bred over many generations, essential to his spiritual

and material well being. Peculiarly adapted to the desolate country in which petitioners live, these animals can carry heavy burdens up to three days without feed or water. (Fdg. 15, R. 28.) They are used to till the dry land crops; they haul water, wood and supplies great distances; they transport petitioners' families, the aged and the sick. (Fdg. 10, R. 26.) Understanding only Navajo commands, the horse is the prized possession of the Navajo. (Fdg. 15, R. 28.) A horse is an inseparable part of Navajo family and religious life, the best horse being selected to ride with his dead master into the after world. (Fdg. 14, R. 28.)

For the confiscation of that irreplaceable asset, the district court granted a judgment for $100,000. *Sua sponte* it entered an order enjoining the respondent's agents from further molesting petitioners pending further action by the court. (R. 49-51.)

The court of appeals reversed the judgment of the district court and directed entry of judgment for the United States. (Clerk, Ct. of App., Typed Tr. 15, 220 F. 2d 666, 672.) The appellate court based its decision on the applicability of the Utah "abandoned horse" statute (220 F. 2d at 670-671), and, disregarding the findings of the district court, also stated that the procedural provisions of the state law had been complied with in the elimination of petitioners' animals and that those animals were "abandoned horses" within the meaning of the statute. 220 F. 2d at 671-672.

Reasons for Granting the Writ

I

This Case Presents an Important Question of Federal Law Which Should Be Settled by This Court

This case presents a direct conflict between the dual obligations of the Department of the Interior as guardian of

the Indians and as administrator of the public range. The respondent's agents, taking advantage of their position of authority over petitioners, destroyed their property for alleged conservation purposes. The court of appeals sanctioned such a subordination of the Government's responsibilities for a helpless people to its interest in land. The validity and wisdom of that decision raises an important question of federal law which has not been, but should be, settled by this Court.

II

Petitioners Have Been Deprived of Their Property Without Compliance With Statutory Requirements or Due Process of Law

Petitioners, as individual Navajo Indians, not only are citizens of the United States (Act of June 2, 1924, 43 Stat. 253, 8 U. S. C. 1401), but also are wards of the federal government. *United States* v. *Kagama*, 118 U. S. 375, 383-4. As such, their private property rights enjoy "the protection guaranteed by the Constitution" and "are secured and enforced to the same extent and in the same way as other residents or citizens of the United States." *Choate* v. *Trapp*, 224 U. S. 665, 677. In addition, petitioners are entitled to the highest performance of the fiduciary obligations owed by the United States to its Indian wards, both tribal and individual. *Cramer* v. *United States*, 261 U. S. 219, 232-233.

In this case, the respondent's agents, as part of a concerted campaign to drive petitioners from their ancestral homes, captured and brutually slaughtered the Indians' horses and, for all practical purposes, destroyed their only means of livelihood. The decision of the court of appeals, denying recovery for these substantial property losses, in effect sanctions action by officers of the United States which

is arbitrary, unlawful and in direct derogation of the statutory and constitutional rights of petitioners.

1. *The destruction of petitioners' animals and the resulting eviction of petitioners from their ancestral homes were contrary to the Taylor Grazing Act.*

Section 3 of the Taylor Grazing Act (48 Stat. 1270, 43 U. S. C. 315b) specifically provides that preference shall be given in the issuance of grazing permits to "bona fide occupants" of the lands, while Section 5 of the Act (48 Stat. 1271, 43 U. S. C. 315d) states in part:

> The Secretary of the Interior *shall permit*, under regulations to be prescribed by him, *the free grazing* within such districts *of livestock kept for domestic purposes* * * *. [Emphasis supplied.]

This statutory language is mandatory. To carry out the express objective of Section 5, therefore, the Federal Range Code provides for the issuance of free-use licenses for grazing livestock kept for domestic purposes, such grazing to be conducted on the federal range within the immediate vicinity of the licensee's residence. 43 CFR 161.6(a).

In this case, the district court found as a fact that petitioners have maintained their residence on these lands for many generations (Fdg. 1, R. 19), and that the animals captured and destroyed by the federal officers were owned and kept by the Indians for domestic purposes, serving as the foundation of their primitive economy. (Fdgs. 9-14, R. 25-28.) The record further discloses that this situation was well known to the Government agent conducting the slaughter of the Navajos' horses (Fdgs. 17, 28, R. 29, 38). Consequently, petitioners, as occupants of the area, were entitled to a preferential status and, under the mandatory requirement of 43 U. S. C. 315d, it was the duty of the Department of the Interior to issue free-use grazing per-

mits to these Indians for domestic purposes and to safeguard the rights of petitioners under those permits.[7] Indeed, for twelve years after passage of the Taylor Grazing Act the petitioners were permitted to graze their horses in the area.

Instead of continuing to protect a helpless, ignorant and poverty-stricken group of Indian wards, the federal agents, in an arbitrary and unnecessarily cruel manner, effected the confiscation and killing of petitioners' domestic animals to carry out the predetermined purpose of summarily forcing the Navajos to flee their permanent homes. This sadistic action of Government officers, in addition to disregarding all concepts of fair play and simple justice to an underprivileged people, was in direct violation of the Indians' rights under the Taylor Grazing Act.

2. *In destroying petitioners' livestock, the Government's agents failed to comply with the provisions of the Federal Range Code.*

Since the Taylor Grazing Act contains no specific provision for the enforcement of its requirements and prohibitions, these subjects are covered in the Federal Range Code promulgated pursuant to the Act.[8] (43 CFR, Part 161.) Section 161.11(a) of that Code stipulates that, whenever there appears to be a willful violation of any provision of the Taylor Grazing Act or the Range Code, the range manager shall notify the alleged violator in writing setting forth the act or acts constituting the alleged violation. Under section 161.11(b), whenever the charge consists of unlawfully grazing livestock on the federal range, the notice

[7] Even in instances where petitioners, through ignorance or otherwise, failed to apply for permits, it was the responsibility of the Department of the Interior, as guardian, to see that domestic-purpose permits were issued to the Indian wards of the United States.

[8] Pertinent portions of the Federal Range Code, 43 CFR, Part 161, are set out in the Appendix, pp. 20-21.

will order the violator to remove the stock. Section 161.11(b) further provides:

> If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary right of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

A reading of 43 CFR 161.11(a) and (b) thus discloses that, as a mandatory condition precedent to the exercise by the range manager of the "proprietary right of the United States * * * under local impoundment law and procedure", there must first have been served on the alleged violator a *written notice* and order concerning the violation, and a failure to comply with that order.

No such written notice, as required by the Range Code, was ever served on petitioners. (R. 401.) Before the court of appeals, respondent successfully contended that compliance with these regulations was not necessary because 43 CFR 161.11(b) purportedly applies only to *known* owners of trespassing animals and the actual ownership of the horses was not clear. As a matter of fact, this argument is wholly unjustified. The district court specifically found that the Government's agents knew to whom the horses belonged [9] and could identify their brands, all of which were plain and some of which were recorded under state law (Fdgs. 24, 28, 30, R. 35, 38, 40), and these facts were recognized by the court of appeals (220 F. 2d at 669). Since the petitioners' ownership of the animals was known to the federal officers, the regulation required that the prescribed

[9] In at least one instance, employees of the Department of the Interior spied upon the home of an Indian until he turned out his animals for forage at night, at which time these agents seized the livestock. (Fdg. 27, R. 37.)

procedure, including *written notice* to the Indians, be followed. Certainly, this simple procedural rule should have been honored where the very livelihood of the individuals affected was at stake.

Regardless of whether notice was given, the actions of the Government's agents in slaughtering petitioners' horses in 1952 demonstrated the complete contempt with which they viewed orderly judicial process. Section 161.11(b) provides for the institution of appropriate legal proceedings to remove livestock from the federal range. During all the time these horses were being destroyed, such proceedings actually were pending before the federal district court, and several of the petitioners were defendants in that case, *United States* v. *Hosteen Tse-Kesi*, 95 F. Supp. 745, reversed 191 F. 2d 518. A final decision in that proceeding would have been a judicial determination of the Indians' right to occupy and graze their animals on these lands.

The respondent's agents chose not to await the outcome of orderly judicial process. Instead, although fully aware of the pending litigation in which they appeared as witnesses, they went out on the range, destroyed the Indians' horses and drove petitioners from the country. Then, these same federal officers had the effrontery to advise the district court that the case was moot because the Navajos no longer were in the area, but did not inform the court of the circumstances under which they were removed. (Fdg. 18, R. 30.) As a result, the proceeding was dismissed.

3. *The brutal destruction of petitioners' livestock by federal officers, ostensibly acting pursuant to state law, constituted a denial of due process.*

The court of appeals reversed the judgment of the district court on the sole ground that the Utah "abandoned horse" statute, a state police power measure, was controlling and properly applied. The court of appeals was in error.

In the first place, the agents of the Department of the Interior are not authorized, by federal regulation or otherwise, to use a state livestock law as a subterfuge for driving Indians from their homes on the public domain. Secondly, even assuming that the Taylor Grazing Act does not preclude the operation of state police measures within federal grazing districts, those remedies may be enforced only by state officers and not by employees of the United States.

Apart from the foregoing considerations, however, the provisions of the Utah "abandoned horse" statute were not followed by respondent's agents in this case. Section 4 of that law requires an authorization by the Board of County Commissioners prior to the commencement of any program to eliminate abandoned horses from the range. Utah Code Annotated, Title 64, c. 2, sec. 4 (1943). The district court found as a fact, based on oral testimony, that there was no such prior authorization by either the Board of County Commissioners or the District Advisory Board. (Fdgs. 21-22, R. 32-35.) The conclusion follows that the confiscation of petitioners' property was not sanctioned.

Lastly, the court of appeals overlooked a fatal defect in the procedure adopted by the federal agents in killing the Indians' horses in that no adequate notice was given to warn the petitioners of the catastrophic loss with which they were faced. The Constitution guarantees that no person shall be deprived of property without due process of law, and among the indispensable elements of due process are the right to reasonable and adequate notice and an opportunity for a hearing. *Milliken* v. *Meyer*, 311 U.S. 457, 463; *Powell* v. *Alabama*, 287 U.S. 45, 68. Moreover, that notice and hearing must be "appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313. If found to be "arbitrary, oppressive and unjust, it may be declared to be not 'due process of law'." *Davidson* v. *New Orleans*, 96 U.S. 97, 107.

In this case, the Navajos had been living and grazing livestock upon these lands since time immemorial. (Fdg. 1, R. 19.) Even after incorporation of the area into a grazing district, they had not been disturbed in their use of the country in common with their non-Indian neighbors for many years. (Fdg. 17, R. 29.) Notwithstanding this situation, the Government's agents undertook a drastic program to wipe the petitioners' horses off the face of the earth. The only prior notice of this impending confiscation was published in a local newspaper and posted at five or six places in the county, on fence posts and sagebrush.

Insofar as the petitioners are concerned, such notice was neither reasonable nor adequate. In the first place, the printed form was not likely to come to the attention of Indians who lived off in a desert area and rarely visited town. Even if it had been seen, this warning could not possibly be understood by ignorant Navajos who do not speak, read or write English. (Fdg. 15, R. 28.) Only by an understanding of the detailed procedures set forth in the notice could the petitioners move to protect their rights. The general notice given, therefore, falls far short of the strict requirements of due process, particularly where the contemplated Government action constitutes a taking of the personal property of known owners, all of whom are wards of the United States dependent upon such animals for their livelihood. See *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, at p. 315; *Cramer* v. *United States*, *supra*, at pp. 232-233.

The question in this case is not whether the published and posted notices were adequate under the law as against persons other than Indians. The wrongs complained of were committed against Navajo Indian wards by employees

of the federal government,[10] who knew the horses belonged to petitioners, who knew that petitioners could not understand the published notices, and who knew that the destruction of their livestock would leave the Indians destitute and force them out of the area. The brutal confiscation of the Navajos' animals by federal officers without warning thus was a flagrant denial of due process.

III

Petitioners Were Denied Equal Protection of the Laws

The Equal Protection Clause of the Fourteenth Amendment, and its implied counterpart in the Fifth Amendment (*Bolling* v. *Sharpe*, 347 U.S. 497, 499), guarantee to every person the equal protection of the laws, particularly in the right to own and enjoy property. *Shelley* v. *Kraemer*, 334 U.S. 1, 10-11. In determining whether equal protection of the laws has been denied, it is not merely the language of a statute or regulation which must be examined, for "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374. See also *Raymond* v. *Chicago Union T. Co.*, 207 U.S. 20, 35-36.

In this case, the action of the Interior Department agents, either as administrators of federal land regulations or as executors of the Utah "abandoned horse" statute, was

[10] As the district court found, the County Board and the Advisory Board did no more than attempt, imperfectly, to approve the action of the federal agents (Fdgs. 21, 22, R. 32-35).

a denial of equal protection of the laws to petitioners, because of the openly discriminatory manner in which the confiscation of the horses was conducted. As has been pointed out, *supra*, p. 6, none of petitioners was given any real opportunity to redeem his animals (Fdgs. 24, 27, R. 35-36, 37). Moreover, where a request for redemption was made an agent of the defendant set the charges at $60 a head, a figure known to be more than petitioners could pay (Fdg. 26, R. 36-37). At the same time, however, the five horses belonging to white men, which were unavoidably included in the roundup, were promptly returned directly to the pastures or corrals of the owners, at a charge of only $2.50 per head (Fdg. 26, R. 36-37). This was discrimination at its worst, directed at these Navajo Indians as a class.[11] A more shocking example of the denial of equal protection, as a result of arbitrary administrative action, could hardly be found.

[11] The district court found that the government's agent intended to capture only petitioners' horses (Fdg. 24, R. 35). Of significance also are the district court's findings that the real objective of the horse roundup was to deprive the Indians of the animals essential to their way of life and thus force them to leave the area (Fdgs. 20, 29-3, R. 32, 40, 42-43).

Conclusion

This case reveals a shameful chapter in the history of the Government's dealings with its Indian wards. Only this Court can remedy the wrong sanctioned by the judgment of the court of appeals. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

The Taylor Grazing Act, as amended, 43 U.S.C. 315 *et seq.*, provides, in part, as follows:

Sec. 315a.

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this chapter and to insure the objects of such grazing districts, namely to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * * and any willful violation of the provisions of this chapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

Sec. 315b.

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

Sec. 315d.

The Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; * * *

The pertinent provisions of the Federal Range Code, 43 CFR 161.1 *et seq.*, provide:

Sec. 161.6 *Issuance of licenses and permits*—(a) *Free-use licenses and permits.* Free-use licenses or permits first will be issued to free-use applicants for not to exceed the number of livestock kept for domestic purposes. Such livestock shall be grazed on Federal range in the immediate neighborhood of the residence of the licensee or permittee.

Sec. 161.11 *Procedure for enforcement or rules and regulations*—(a) *Service of notice.* Whenever it appears that there has been any willful violation of any provision of the act or of the Federal Range Code for Grazing Districts, the range manager will cause the alleged violator and any interested lien holder who has filed notice of his lien with the Bureau of Land Management to be served with a written notice, which will set forth the act or acts constituting such violation and in which reference will be made to the provision or provisions of the act or the Federal Range Code for Grazing Districts alleged to have been violated. Such notice may be served in person or by registered mail and the affidavit of the person making personal service or the registry receipt shall be preserved.

(b) *Unlawful grazing on Federal range; removal of livestock; impoundment.* Whenever the charge consists of unlawfully grazing livestock on the Federal range, the notice served on the alleged violator and

any interested lien holder who has filed notice of his lien with the Bureau of Land Management will order the alleged violator to remove the livestock or to cause them to be removed immediately or within such reasonable time as may be specified. If the alleged violator fails to comply with the notice the range manager may proceed to exercise the proprietary riglit of the United States in the Federal range, under local impoundment law and procedure, if practicable; otherwise he may refer the matter through the usual channels for appropriate legal action by the United States against the violator.

5 Utah Code Annotated, 1953, Title 47, Chapter 2, provides:

47-2-1. *"Abandoned Horse" Defined.*

The term "abandoned horse" as used in this chapter means any horse, ass, mule or other animal of the genus equus, unbranded, or, if branded, that has escaped assessment for taxation for the year next preceding the killing of such animal as hereinafter provided for, and running at large upon the open range of this state, and includes a foal running with a dam coming within the above definition. An animal not bearing a decipherable brand recorded in the office of the recorder of marks and brands shall be deemed unbranded.

47-2-2. *"Open Range" Defined.*

The term "open range" means all land not privately owned, and includes all roads, outside of private inclosures, used by the public, whether the same have been formally dedicated to the public or not.

47-2-3. *Abandoned Horses on Open Range; A Nuisance.*

It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range, and every abandoned horse is declared to be a public nuisance and a public menace, and is condemned subject to the right of its owner to reclaim it under the conditions hereinafter provided.

47-2-4. *Elimination by County Commissioners—Notice of Intention.*

The board of county commissioners may provide for the elimination of abandoned horses in the respective counties in the following manner:

They shall cause notice to be published at least once a week for three successive weeks in some newspaper of general circulation published in the county, and such notice shall also be posted in at least five public places outside of the county seat on public highways in such county, and in three public places at the county seat, one of which shall be at the front door of the court house. The notices posted outside of the county seat shall be posted not less than two miles apart, and all posted notices shall be posted at least thirty days before the date which the county commissioners shall fix for the beginning of the elimination of abandoned horses from the range in such county as hereinafter provided. If no newspaper is published in the county, publication in a newspaper shall not be required.

Such notice shall be substantially in the following form:

Notice is hereby given that in accordance with the provisions of law the board of county commissioners of County, Utah, will proceed to

eliminate abandoned horses from the open range in said county, and that beginning on the day of , 19 , a drive will be held, and all abandoned horses running upon the open range will, under the direction and supervision of the county commissioners, be eliminated. All owners of horses running upon the open range are hereby given notice to file with the board of county commissioners a description of such horses, and the brands or marks thereon.

Dated this day of , 19 .

By order of the board of county commissioners of County, Utah.

County Clerk.

47-2-5. *Elimination by County Commissioners—Method.*

The manner and method of eliminating abandoned horses from the open range shall be in the discretion of the board of county commissioners, and it shall be its duty to so eliminate abandoned horses, using the means most effective and economical under the circumstances. The board may, in its discretion, sell all captured horses.

47-2-6. *Owners May Repossess—Damages—Taxes.*

Any person owning any horses which are running at large in any county in which the board of county commissioners has given notice of intention to make a drive, as provided in this chapter, may within thirty days after posting or the first publication of the notice mentioned in section 47-2-4 file with the board of county commissioners a description of such horses claimed by him, giving the marks and brands, if any, which appear thereon, and, if the board of county commissioners

shall take into its possession any horses so claimed, it shall by registered letter addressed to the owner or claimant of such horses notify him that the same may be claimed within ten days from the mailing of such notice; and such owner or claimant shall be permitted upon application to the board to take possession of such horses upon payment of the expense of caring for the same from the date of capture. If any horses are killed by the county commissioners under the provisions of this chapter, a description of which has been reported by the owner thereof to the board, and ownership of such animals can be satisfactorily established, such owner shall receive as damage therefor a sum not exceeding $10 for each animal; *provided*, that he has paid all taxes assessed against said animal; *provided further*, that payment of such claims may be made only from proceeds of sales of captured horses.

47-2-7. *Elimination from Private Property on Request.*

Abandoned horses may be eliminated from privately owned land by the board of county commissioners in the same manner as from the open range when requested so to do by the owner of such land.